

University of Canterbury



PCAS 18 (2015/2016)

Critical Literature Review (ANTA602)

Do Antarctic Specially Protected Areas Provide Further Entrenchment of a Sovereign Claim?

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Word count: 3009

Abstract:

Antarctic Specially Protected Areas (ASPAs) are the main designation bestowed onto areas deemed to have values that need protection. There has been an inconsistent method by which party states have selected areas to be put forward as ASPAs. No overriding framework has been confirmed and applied universally across the management of protected areas. Neither has there been a concerted effort to create a network of ASPAs that are representative of the diverse eco-systems in Antarctica. The locations of existing ASPAs are within the confines of sectors subject to a sovereign claim. There is a correlation between the party responsible for the management of an ASPA and the location of the ASPA. The consequence of this correlation is evidence of an effort by claimant parties to further entrench their sovereign claims and exercise a degree of control over areas within their claim.

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Focus Questions

How does the Treaty System govern the creation of protected areas?

Are protected areas geographically correlated with sovereign claims?

To what extent are the current management provisions adequate?

Introduction

1 The Antarctic Treaty System is widely regarded as one of the hallmarks of international cooperation.¹ Nations came together in the midst of the Cold War to reserve their sovereign claims for the benefit of science and the preservation of peace.² Despite the relative peace that the continent has had for the past fifty years, there have still been areas of uncertainty in the Treaty System. An area of interest is the creation of Antarctic Specially Protected Areas (ASPAs).³ The Antarctic continent currently has a total of 72 ASPAs.⁴ The vast majority of these areas are within the confines of the areas subject to a sovereign claim. Furthermore, the proposition to create new ASPAs tends to have its genesis with the nation with a claim over the territory the ASPA is contained in.⁵ This is arguably by coincidence however the literature provides reasons to the contrary.

The Geopolitics of Protected Areas

2 Antarctica is an international continent by virtue of the governing mechanisms contained within the Antarctic Treaty System (ATS). Nations are relatively collegial despite the absence of universally recognised sovereignty. Geopolitics is present to varying extents in any

¹ Karen Scott “Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The next Fifty Years” (2010) Vol.20 No.1 Yearbook of International Environmental Law at 6

² Ibid at 1

³ Justine Shaw, Aleks Terauds, Martin Riddle, Hugh Possingham and Steven Chown “Antarctica’s Protected Areas are Inadequate, Unrepresentative, and at Risk” (2014) Vol.12 No.6 PLOS Biology at 1

⁴ Secretariat of the Antarctic Treaty Antarctic Protected Areas Database (Dec 2015)

⁵ ASPA creation resolutions

international environment given the different and at times competing interests that states may exhibit.

- 2.1 Scott begins with this powerful opening statement in her paper *Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years*.

“The interconnected notions of sovereignty and territorial jurisdiction underpin the management, regulation, and control of every major landmass other than the continent of Antarctica.”⁶

Management and regulation are difficult to engender without sovereignty. However, the ATS grants decision-making powers to the Antarctic Consultative Parties.⁷ To a minor extent this power is representative of territorial control but it does not grant the right or power of exclusion to non-party states. De facto veto power is granted to every Consultative Party as decision-making is conducted by consensus.⁸

- 2.2 Scott unravels her opening statement largely within the confines of Article IV. Scott observes that management in Antarctica is not devoid

⁶ Karen Scott “Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The next Fifty Years” (2010) Vol.20 No.1 Yearbook of International Environmental Law at 1

⁷ The Antarctic Treaty (opened for signature 1 December 1959) Article IX

⁸ Ibid

of sovereign or territorial tensions.⁹ The existence of claims is not forgotten and Scott concludes that:

*“the very existence of the disputed claims has influenced, shaped, and, arguably, limited the development of the Antarctic Treaty System (ATS) and, consequently, indirectly impacts on the rights and obligations of all states operating within the region.”*¹⁰

The voting distinction between a Consultative Party and a non-Consultative Party further segregates the decision-making bodies. All nations with a claim are Consultative Parties and are thereby privileged by design. Article IV does not remove the question of sovereignty. States party have instead used the Article to avoid confrontation and nationalistic disagreement. The current framework is under stress with resource activity increasing and nationalist rhetoric from states.¹¹

How are ASPA Created?

- 3 The Protocol on Environmental Protection to the Antarctic Treaty (The Madrid Protocol) provides the mechanism for the creation of ASPA. Article 3 within Annex V of the Protocol outlines the criteria by which parties to the Treaty shall:

⁹ Karen Scott “Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The next Fifty Years” (2010) Vol.20 No.1 Yearbook of International Environmental Law at 14

¹⁰ Ibid at 5

¹¹ Ibid at 6

“seek to identify, within a systematic environmental-geographical framework, and to include in the series of Antarctic Specially Protected Areas”¹²

- 3.1 A number of suggested reasons are listed to justify creating an ASPA but a generic clause in Article 3(2)(i) enables any area to be designated provided it is consistent with the values listed in paragraph 1:

“... outstanding environmental, scientific, historic, aesthetic or wilderness values, any combination of those values, or ongoing or planned scientific research.”¹³

These broad values give a reasonable degree of discretion to parties when proposing new areas for protection.

- 3.2 ASPA are usually proposed by individual parties as opposed to being put forward by a consortium of states.¹⁴ Consequently, ASPA are dealt with individually rather than as a whole within a governing framework. The Madrid Protocol does mention a governing framework mechanism for ASPA creation but this “systematic environmental-geographical framework” has yet to be realised.¹⁵

¹² The Protocol on Environmental Protection to the Antarctic Treaty (opened for signature 4 October 1991) Annex V Article 3(2)

¹³ Ibid at Annex V Article 3(1)

¹⁴ Resolution database observations

¹⁵ The Protocol on Environmental Protection to the Antarctic Treaty (opened for signature 4 October 1991) Annex V Article 3(2) and S Chown, J Lee and K Hughes et al. “Challenges to the Future Conservation of the Antarctic” (2012) Vol.337 No.6091 Science at 158

What Protection do ASPA Confer?

Management Plans

- 4 Annex V Article 5 requires ASPA to have management plans in place. Management plans have a broad array of conditions that can be imposed on the area. The minimum requirements are an appropriate geographic size and an adequate consideration of the values that are to be protected.¹⁶ A list of other conditions are provided including the ability to prohibit access, restrict certain activities from occurring as well as controlling the building of structures and field camps.¹⁷
- 4.1 Pertierra and Hughes note that the creation of the management plan as well as the responsibility for the ongoing management of an ASPA is usually conducted by the state proposing the area.¹⁸ This confers a reasonable degree of authority to a state that is successful in creating an ASPA. But the ASPA must be approved at an Antarctic Treaty Consultative Meeting (ATCM) which is governed by the consensus of Consultative Parties.
- 4.2 Controls on tourist activity and visitor numbers are one area of contention as many ASPA are proposed where there is human activity. There is no universal method of determining the numbers of visitors to an area. Some parties allow a considerable number of visitors to enable

¹⁶ Ibid at Annex V Article 5(2)

¹⁷ Ibid at Annex V Article 5(3)

¹⁸ L Pertierra and K Hughes "Management of Antarctic Specially Protected Areas: Permitting, Visitation and Information Exchange Practices" (2013) Vol.25 No.4 Antarctic Science at 554

education and outreach. There have also been limitations put in place on the nationality of visitors.¹⁹ This type of restriction prohibits access to citizens who are not of a nationality that is approved under the national legislative permitting regime. Non-nationals must have their permit approved by their own domestic authority. This demonstrates the limits of the Treaty System due to the dependency on national legislative implementation rather than an overarching protected area governance framework.

Administration of Management Plans

4.3 There is ambiguity in the administration of protection as the provision of permits can be governed either from a citizen's national legislation or the legislation of the state responsible for the management of the ASPA. Ambiguity will only continue without an overarching framework in place as stipulated in Article 5 of the Protocol. There is no prohibition on one state deciding to permit an activity that another state may disapprove of provided that it is not a violation of the management plan.²⁰ This prevents one state's permitting authority holding other states to ransom but as a consequence no universal standard can be applied consistently.

4.4 Information sharing is an essential process to ensure that the data behind the management conditions are valid and effective. Visitor data must be provided pre-season and preferably prior to the visit

¹⁹ Ibid

²⁰ The Protocol on Environmental Protection to the Antarctic Treaty (opened for signature 4 October 1991) Annex V Article 7(1)

occurring.²¹ Annual reports must be provided to the Committee for Environmental Protection (CEP) to ensure that the provisions of the ASPA are adequate. Annual report reviews by CEP act as a key source of advice and administrative support to parties responsible for the management of ASPA. Management disputes can be avoided far more effectively with information sharing.

²¹ L Pertierra and K Hughes “Management of Antarctic Specially Protected Areas: Permitting, Visitation and Information Exchange Practices” (2013) Vol.25 No.4 Antarctic Science at 554

The Current Dispersion of Protected Areas

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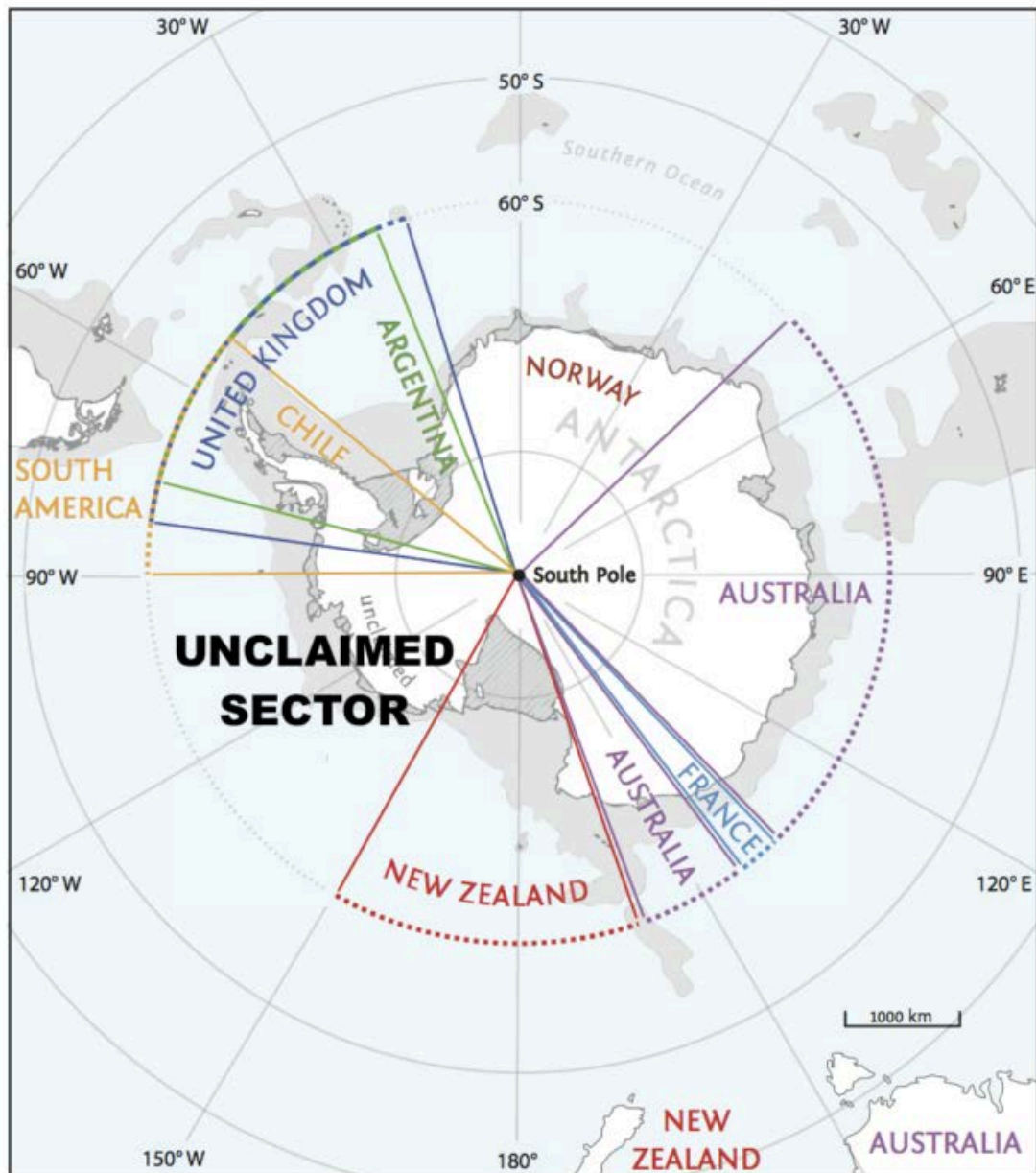


Figure: The Unclaimed Sector and Territorial Claims in Antarctica

- 5.1 Annex V of the Protocol only administers the creation of terrestrial protected areas as the creation of marine protected areas is delegated to the Commission on the Conservation for Antarctic Marine Living

Resources.²² The ice-free area of Antarctica is vast equating to 46,253km².²³ Only 1.5% of this area is a designated protected area.²⁴ This study did not include the ice-covered areas of Antarctica, which is representative of the majority of the continent. Antarctica is in the lowest quartile for protected areas designation²⁵ and significantly below the 17 percent level stipulated under Aichi Target 11 from the Convention on Biological Diversity Strategic Plan for Biodiversity 2011-2020.

- 5.2 Both the Madrid Protocol and the Aichi Targets include the principle of ecological representation.²⁶ That means that the protected areas should encompass a sufficient diversity of ecosystems to ensure biodiversity is adequately protected. Yet the majority of protected areas in Antarctica are close to human activity and there are vast expanses that feature a low density of ASPA. Five of the eco-regions have no protection whatsoever.

²² Convention on the Conservation of Antarctic Marine Living Resources (opened for signature 1 August 1980) Article 1

²³ Justine Shaw, Aleks Terauds, Martin Riddle, Hugh Possingham and Steven Chown "Antarctica's Protected Areas are Inadequate, Unrepresentative, and at Risk" (2014) Vol.12 No.6 PLOS Biology at 2

²⁴ Ibid

²⁵ Ibid

²⁶ The Protocol on Environmental Protection to the Antarctic Treaty (opened for signature 4 October 1991) Article 3(2)(b) and Convention on Biological Diversity Strategic Plan for Biodiversity 2011-2020 Aichi Target 11

5.3

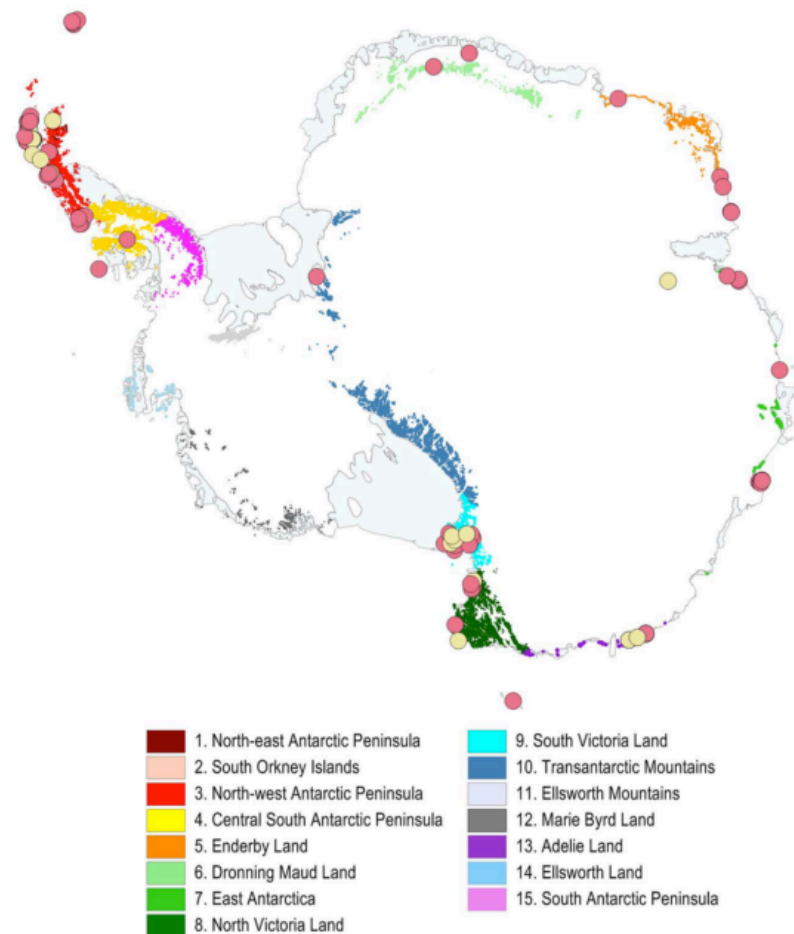


Figure 1. Location of Antarctic Specially Protected Areas (ASPAs) and Antarctic Conservation Biogeographic Regions (ACBRs). Red circles indicate ice-free ASPAs that protect terrestrial biodiversity, and yellow circles are ASPAs that are not ice-free or do not support terrestrial biodiversity, and therefore were not used in the analyses. Coloured areas represent ice-free land; different colours denote the ACBRs (see [27]).
doi:10.1371/journal.pbio.1001888.g001

5.4 One area of note is the unclaimed sector. This is the area comprising nearly 20 percent of West Antarctica wedged between the Chilean and New Zealand claims. There are no ASPA in this region of Antarctica.²⁷ Hemmings and Gilbert argue that this might be as a consequence of the lack of human activity in the region in addition to the lack of any territorial claim.²⁸ With only one permanently habited base in the sector, which is located at the pole and thus part of every sector, West

²⁷ Alan Hemmings and Neil Gilbert “Antarctica’s Unclaimed Sector” (2015) Vol.33 No.4 Antarctic at 2

²⁸ Ibid

Antarctica has remained relatively isolated from human interference. The creation of extensive ASPA in this sector would be in congruence with a framework of protected areas on the continent. If the principle of representative ecological examples is to be maintained then the absence of any ASPA in West Antarctica calls into question the legitimacy of the current *modus operandi* behind the creation of protected areas.

Towards a Protected Area Framework

- 6 The threat of human impact in Antarctica is difficult to quantify. Environmental Impact Assessments (EIA) are a requirement for any activity in the continent that has a more than minor environmental impact.²⁹ Article 2 of the Protocol specifies the continent as a “natural reserve” which aids in the perception that designated protection under Annex V of the Protocol may not be necessary. Although the Convention on Biological Diversity excludes Antarctica, the management task of protecting areas in Antarctica is significantly less than in other areas globally.³⁰ Meeting Aichi Target 11 will be more easily achieved if the assessment of ASPA creation is made as part of a systematic framework of protected area management.

²⁹ The Protocol on Environmental Protection to the Antarctic Treaty (opened for signature 4 October 1991) Annex I

³⁰ Justine Shaw, Aleks Terauds, Martin Riddle, Hugh Possingham and Steven Chown “Antarctica’s Protected Areas are Inadequate, Unrepresentative, and at Risk” (2014) Vol.12 No.6 PLOS Biology at 4

Alternative Models of Territorial Management

- 6.1 There are three examples of alternative territorial management described by Scott.³¹
- 6.2 The first is the 1920 Svalbard Treaty. This granted equal resource rights to all parties to the Treaty in the Svalbard archipelago in the Arctic despite the region being recognised as the sovereign territory of Norway. Applying this type of compromise in the Antarctic would still not address the issues of maritime exclusive economic zones or the continental shelf.³² Terrestrial management would be cumbersome given that granting equal resource rights to all parties in the sovereign region would not be a departure from the current rights granted to parties to the ATS.
- 6.3 The Moon and the Deep seabed are the second and third examples.³³ Both of these areas are remote and not subject to human occupation. The governing principle of these areas has been termed “the common heritage of mankind”.³⁴ Scott describes this principle as an area:

*“not subject to national appropriation by claim of sovereignty
and is open to exploration and use by all states without*

³¹ Karen Scott “Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The next Fifty Years” (2010) Vol.20 No.1 Yearbook of International Environmental Law at 29

³² Ibid

³³ Karen Scott “Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The next Fifty Years” (2010) Vol.20 No.1 Yearbook of International Environmental Law at 30

³⁴ Ibid

discrimination for the benefit and in the interests of all mankind."³⁵

Scott notes that this principle is largely meaningless as it fails to take into account "market-based principles to the exploitation of celestial resources".³⁶ Applying the common heritage principle to Antarctica would be a step backwards in the efforts to protect it. Nations would be entitled to exploit Antarctic resources provided it was for the benefit of human progress. No other nation would be able to "discriminate" against another in terms of assessing this benefit resulting in a quagmire of competing justifications and applications.

- 6.4 Scott's assessment of historic management approaches to remote and commons resources leads to the suggestion of creating a new Antarctic Management Authority.³⁷

A Management Authority

- 6.5 An Antarctic Management Authority (AMA) would supplant the existing ATCM and possess a sovereign legal identity. An AMA would be able to negotiate with other nations outside of Antarctica as well as interact with other international agreements.³⁸ Protected areas would be governed by one sole sovereign authority instead of the current status quo at an ATCM.

³⁵ Ibid at 31

³⁶ Ibid

³⁷ Ibid at 35

³⁸ Karen Scott "Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The next Fifty Years" (2010) Vol.20 No.1 Yearbook of International Environmental Law at 38

- 6.6 The benefits of an AMA are contestable. Having one authority to administer ASPA ensures that the values that underpin the protection conferred are consistent and evenly attributed. There would be little incentive for the AMA to place ASPA in areas that are convenient or relevant to individual state preferences.
- 6.7 However, an AMA would unlikely succeed in displacing national interests. Scott does not detail the identity of the decision-makers. If the AMA were to be governed by a committee of representatives then the perspectives would not be devoid of individual intentions. Consequently, Scott's alternative is similar to the current governance model. The creation of an overarching framework for the creation of protected areas would benefit ASPA instead. As with the AMA, individual nations would still have their own perspectives but the principles and values governing the ASPA would be applied and managed consistently.

A Systematic Environmental-Geographical Framework

- 6.8 Resolution 1 (2000) of the SATCM XII Final Report outlines a proposed guideline for the implementation of a framework for protected areas.³⁹ The aim of the guideline clearly articulates the concerns expressed in the literature:

³⁹ SATCM XII Final Report (2000) Resolution 1 preamble

“provide a set of tools to enable more systematic assessment, selection, definition and proposal of areas ... they will facilitate methodical assessment and designation of such areas.”⁴⁰

Attendees of the Special Consultative Meeting recognised the lack of a systematic approach to protected areas and the lack of any cohesive and consistent method. The document is substantive in terms of the research that it builds upon including the existing *Guide to the Preparation of Management Plans for Protected Areas* from ATCM XXII and the policy documents of the International Union for Conservation of Nature (IUCN). Within the guidelines is a flow diagram that provides a system for the establishment of a protected area.

⁴⁰ Ibid at 1

6.9

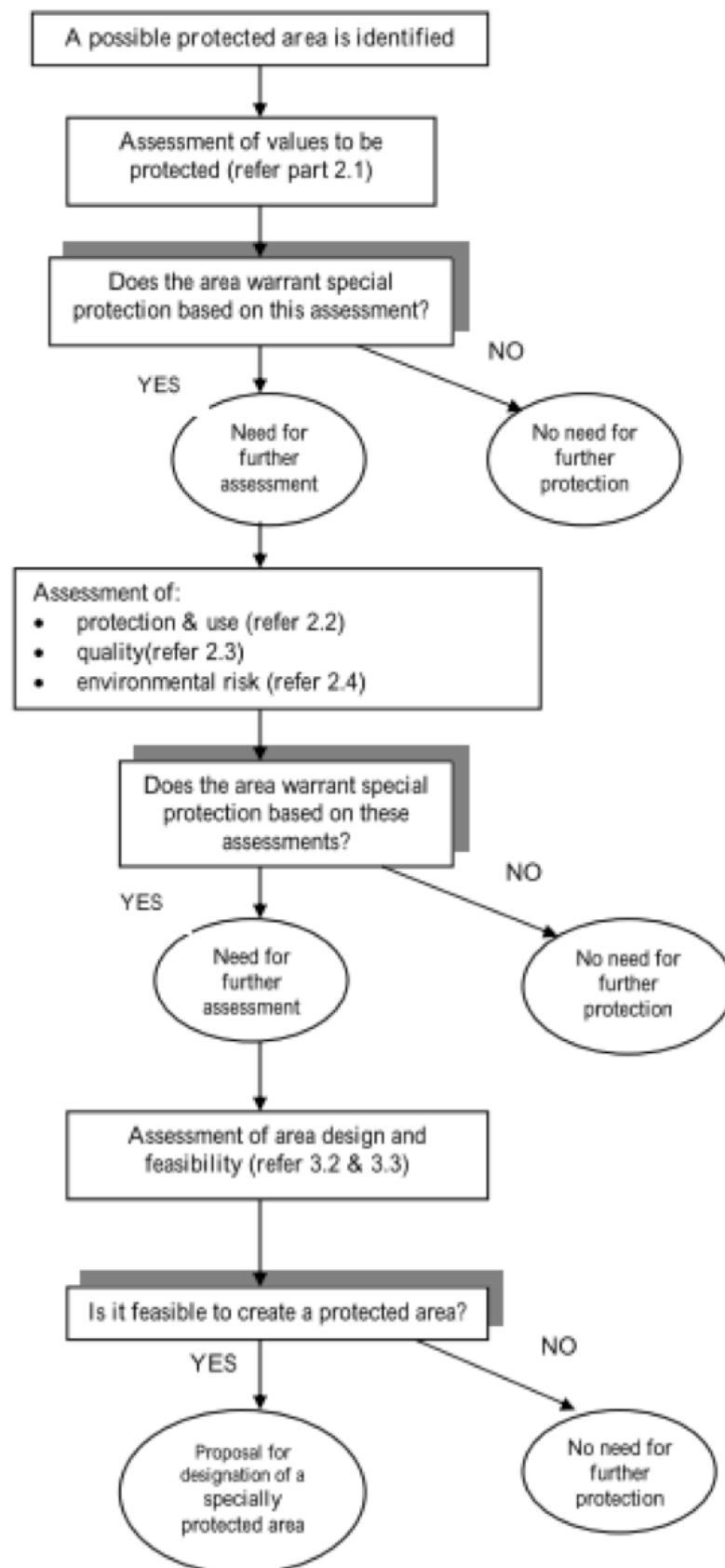


Figure 2. The assessment process for potential protected areas as outlined in Part II and Part III of these guidelines.

- 6.9.1 These guidelines were adopted by the Consultative parties 15 years ago. They form the basis of a systems-based framework for the creation of protected areas. There have not been substantive developments in the unclaimed sector and ASPA have continued to be created in proximity to human activity. The review and delisting of sites seldom occurs and the guidelines do not provide a mechanism for this to be assessed. Parties do not seem to be applying the guidelines in the context of an Antarctic-wide geographical framework of protected areas.

The Current Legitimacy of ASPA

- 7 By definition, the primary purpose that justifies the creation of an ASPA is protection. A proposal for a protected area would be unlikely to succeed if it did not meet the criteria listed in Annex V Article 3 of the Protocol as the Consultative Parties need to agree to its creation. Administering the management of an area is also an additional strain on resources for National Antarctic Programmes (NAP). These factors provide good cause to establish an ASPA.
- 7.1 There are three factors contributing to the notion that protected areas are created to support a sovereign claim.
- 7.2 The first factor is dispersion. As Hemmings and Gilbert observe, West Antarctica is devoid of ASPA and the majority of protected areas are located in the sector claimed by the state responsible for that particular

area's management. This reduces the legitimacy of any ecological argument in favour of ASPA creation. A broader representation and geographical placement would be expected if parties were genuinely concerned about protecting areas for legitimate reasons under the Protocol. Whilst parties may justify this disparity on the basis that they only protect areas that their NAP operates, it does not explain the absence of a collaborative effort to establish a broader array of ASPA as many NAPs operate in the same areas including in the unclaimed sector.

- 7.3 The second factor is management conditions. Parties can place conditions under the management plan that restricts or prohibits activities and the number of visitors. The permitting regime may be administered multinationally although the parties' individual domestic authorities usually do it. As decision-making is done by consensus at ATCMs, authority is distributed amongst Consultative Parties. This prohibits parties from having an exclusive authority other than a veto. A management plan enables a party to create limitations and restrictions that may serve their interests. Restricting access through recognised borders is one of the hallmarks of sovereignty. Whilst the management plan needs to be approved at an ATCM it can still surreptitiously provide a supporting basis of a sovereign claim as it justifies the power of exclusion.

- 7.4 The third factor is governance. A party that proposes an ASPA is usually the party that is responsible for administering the management of the area. The extent to which this grants control of an area is still minor as all decision-making must still be subject to the permitting authority which may be a foreign state and any concerns can be arbitrated at an ATCM.

Conclusion

- 8 Protected areas are in keeping with the spirit of the ATS. Preservation was a key principle in the founding of the ATS and any new ASPA is unlikely to be in breach of this principle. This principle of protection was tempered with the principle of representation. Protected areas should not bias a particular set of values and the method of their creation should be considered within a geographical framework instead of on an isolated individual approach. This has been largely unenforced although efforts have been made to address the need for an overarching framework. Claimant parties have used ASPA to place conditions in areas that lie within proximity of their NAP and the sectors that they claim. The absence of ASPA in West Antarctica and the strong correlation between the location of an ASPA and the nation proposing it indicates that there are reasons in addition to preservation that are providing the impetus for parties to take on the burden of administering an ASPA. Entrenching a sovereign claim is one likely reason behind the creation of an ASPA.

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Figure: Alan Hemmings in "Antarctica" (2015) Vol.33 No.4

Figure 1: Justine Shaw, Aleks Terauds, Martin Riddle, Hugh Possingham and Steven Chown in "PLOS Biology" (2014) Vol.12 No.6 PLOS Biology

Figure 2: Anon in "Resolution 1" (2000) Special Antarctic Treaty Consultative Meeting XII